

## Message Text

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ACTION EUR-12

INFO OCT-01 ISO-00 PM-03 L-02 NSC-05 CIAE-00 DODE-00

INR-07 NSAE-00 PA-01 RSC-01 USIA-06 PRS-01 SP-02

ACDA-05 SAJ-01 EB-07 BIB-01 /055 W

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R 201420Z JAN 75

FM USMISSION USBERLIN

TO AMEMBASSY BONN

INFO SECSTATE WASHDC 372

C O N F I D E N T I A L USBERLIN 100

E.O. 11652: GDS

TAGS: PGOV, WB, GW

SUBJECT: ABORTION LAW--DRAFT BK/O TO ESTABLISH NEW  
PROCEDURE ON CONSTITUTIONAL COURT DECISIONS

REFS: A) STATE 181058 (1974); B) USBERLIN 1136 (1974);  
C) STATE 149157 (1974); D) USBERLIN 1161 (1974)

1. SUMMARY: ALLIED MISSIONS HAVE BEEN CONSULTING  
TRIPARTITELY AND WITH SENAT OVER PAST SEVERAL MONTHS ABOUT  
PROBLEMS ARISING OUT OF FEDERAL CONSTITUTIONAL COURT DECISIONS.  
PURPOSE HAS BEEN: A) TO PUT US IN POSITION TO RESPOND TO  
CONSTITUTIONAL COURT DECISION PROMISED FOR JAN 29 ON ABORTION REFORM  
LAW B) TO PROVIDE AGREED PROCEDURE FOR DEALING WITH OTHERS LAWS  
IN FUTURE WHICH KARLSRUHE COURT EJOINS BEFORE ADOPTION  
IN BERLIN; AND C) TO PROVIDE AGREED PROCEDURE FOR  
RECONCILING LAW IN FRG AND BERLIN IN OTHER CASES WHERE  
INCREASINGLY ASSERTIVE CONSTITUTIONAL COURT MAKES  
DECISION WHICH IN EFFECT AMENDS RATHER THAN SIMPLY ANNULS OR CONFIRMS  
LAW. SENAT IS PRESENTLY STUDYING ALLIED PROPOSAL FOR AUTHORIZATION  
(BK/O) TO SENAT AND HOUSE OF REPRESENTATIVES TO MAINTAIN LEGAL UNITY  
BY PASSING SPECIAL BERLIN LAW TO MODIFY LAW TAKEN OVER BY MANTEL-  
GESETZ IN SAME MANNER AS LAW HAS BEEN MODIFIED IN FRG  
BY CONSTITUTIONAL COURT DECISION. END SUMMARY.

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2. SENAT WELCOMED DEPARTMENT INTEREST (REF A) IN

DEVELOPING AGREED PROCEDURE FOR DEALING WITH CONSTITUTIONAL COURT INTERVENTIONS, AS IN ABORTION LAW CONTROVERSY, WHICH THREATENED LEGAL UNITY BETWEEN FRG AND BERLIN ON IMPORTANT SOCIAL OR ECONOMIC QUESTIONS. SENAT INITIALLY EXPRESSED PREFERENCE FOR ONE OF FOLLOWING SOLUTIONS: A) ORDINANCE TO BE ISSUED BY FRG MINISTER UNDER OLD LAW (USED MANY YEARS AGO TO TAKE OVER SOME PARTS OF CURRENCY REFORMS), WHICH WOULD IN EFFECT AUTHORIZE BERLIN SENATOR FOR JUSTICE TO PROMULGATE SUBSTANCE OF CONSTITUTIONAL COURT DECISION; B) SPECIAL BUNDESTAG LAW WHICH WOULD PROVIDE FOR SUBSTANCE OF COURT DECISION TO HAVE EFFECT IN BERLIN AND WHICH WOULD THEN BE ADOPTED IN BERLIN BY MANTELGESETZ; C) ALLIED BK/O WHICH WOULD AUTHORIZE SENAT TO PUBLISH AND THUS PUT INTO EFFECT IN BERLIN CONSTITUTIONAL COURT DECISIONS WHICH AMENDED LAWS ADOPTED IN BERLIN BY MANTELGESETZ. FIRST TWO SENAT PROPOSALS INVOLVED SPECIAL FRG ACTIONS WITH EFFECT ONLY IN BERLIN, AND ALLIES THOUGHT IT UNDESIRABLE TO AUTHORIZE DIRECT APPLICATION OF CONSTITUTIONAL COURT DECISIONS WITH ONLY SO THIN A BERLIN COVER AS PUBLICATION BY SENAT IN GESETZ-UND-VERORDNUNGSBLATT.

3. ALLIES SAW NO DIFFICULTY, HOWEVER, WITH BERLIN HOUSE OF REPRESENTATIVES PASSING ITS OWN LAW AMENDING A LAW TAKEN OVER IN BERLIN IN SAME MANNER AS CONSTITUTIONAL COURT HAD AMENDED THAT LAW FOR FRG. INTERPOSITION OF HOUSE OF REPRESENTATIVES ACTION WOULD REBUT ANY SUGGESTION THAT CONSTITUTIONAL COURT HAD JURISDICTION FOR BERLIN OR THAT FRG EXECUTIVE OR LEGISLATIVE BRANCHES WERE EXERCISING DIRECT STATE AUTHORITY OVER CITY. SENAT WAS INITIALLY LEERY OF PROPOSAL SINCE IT WISHED TO AVOID ANY IMPLICATION THAT HOUSE OF REPRESENTATIVES COULD OR SHOULD PASS OWN LAWS THAT MIGHT DIFFER IN ANY WAY FROM LAWS PASSED BY BUNDESTAG. AT MEETING JANUARY 17 WITH SENATOR FOR JUSTICE KORBER ALLIED REPS SUGGESTED FOLLOWING DRAFT BK/O INTENDED TO FINESSE DIFFERENCE IN ALLIED AND GERMAN LEGAL THEORY ON AUTHORITY OF HOUSE OF REPRESENTATIVES TO PASS OWN LAWS.

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4. BEGIN TEXT:

SUBJECT: DEPRIVING LEGAL PROVISIONS OF EFFECT IN BERLIN  
THE ALLIED KOMMANDATURA ORDERS AS FOLLOWS:

1. IF LEGAL PROVISIONS IDENTICAL TO THOSE WHICH HAVE BEEN OR ARE IN FUTURE ADOPTED IN BERLIN HAVE BEEN OR ARE MODIFIED BY A JUDICIAL DECISION WITH THE FORCE

OF LAW IN THE FEDERAL REPUBLIC, THE SENAT AND THE HOUSE OF REPRESENTATIVES ARE AUTHORIZED TO PREPARE AND TO ADOPT LEGISLATION TO EFFECT A SIMILAR RESULT IN THE WESTERN SECTORS.

2. ALL SUCH LEGISLATION PREPARED BY THE SENAT AND THE HOUSE OF REPRESENTATIVES AFTER THE DATE OF THIS ORDER SHALL BE SUBMITTED PRIOR TO ADOPTION TO THE ALLIED KOMMANDATURA WHICH MAY RAISE OBJECTIONS WITHIN TWENTY-ONE DAYS.

3. THE PRESENT ORDER SHALL NOT BE INTERPRETED AS AFFECTING IN ANY WAY THE PROVISIONS OF BK/L(52)35 OR SUBSEQUENT RELATED ALLIED KOMMANDATURA DIRECTIVES.

4. NOTHING IN THIS ORDER IS TO BE REGARDED AS AFFECTING THE EXERCISE OF ALLIED RIGHTS AND IN PARTICULAR THE RIGHT TO TAKE ANY APPROPRIATE MEASURES WITHIN THE SCOPE OF THE FIELDS SPECIFIED IN THE DECLARATION OF THE ALLIED KOMMANDATURA OF 1955.

5. THIS ORDER WILL BE TRANSMITTED TO THE GOVERNING MAYOR, BERLIN, FOR SUCH ACTION AS MAY BE NECESSARY IN RELATION TO IT, INCLUDING PUBLICATION IN ACCORDANCE WITH BK/O(64)4.  
END TEXT.

5. KORBER, WHO STESSED POLITICAL SIGNIFICANCE SENAT ATTACHES TO LEGAL-UNITY ISSUE, WAS OPTIMISTIC THAT SOLUTION APPLICABLE TO ANY DECISION CONSTITUTIONAL COURT MIGHT GIVE JANUARY 29 ON ABORTION LAW AS WELL AS TO FUTURE COURT DECISIONS COULD BE FOUND ON BASIS OF DRAFT TEXT, THOUGH HE AND CHANCELLERY LEGAL SPECIALISTS  
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SAID THEY WISHED TO STUDY TEXT FOR FEW DAYS AND WOULD PROBABLY HAVE DRAFTING SUGGESTIONS. WE URGED SENAT TO PROVIDE US ENOUGH LEAD-TIME TO PASS TEXT TO EMBASSIES AND CAPITALS FOR VIEWS BEFORE JANUARY 29 DEADLINE.

6. COMMENT: WE WOULD EXPECT SENAT TO SUGGEST STRENGTHENING "AUTHORIZATION" LANGUAGE IN PARA 1 OF DRAFT BK/O, BUT KORBER'S REACTION TO TEXT WAS ON WHOLE POSITIVE. WE ARE THEREFORE HOPEFUL THAT BASIC THRUST OF DRAFT WILL BE ACCEPTABLE. PROVISION IN PARA 2 OF BK/O FOR 21-DAY REVIEW OF PROPOSED LEGISLATION WOULD PERMIT US TO VETO ANY BILL WHICH SOUGHT TO ENACT UNACCEPTABLE CONSTITUTIONAL COURT DECISION. BK/O(52)35 IS BASIC ALLIED ORDER DENYING CONSTITUTIONAL COURT JURISDICTION IN BERLIN AND "SUBSEQUENT RELATED AK

DIRECTIVES" CITED IN PARA 3 ARE OTHER ALLIED PRONOUNCEMENTS ON COURT'S LACK OF COMPETENCE IN BERLIN MATTERS, INCLUDING 1974 BK/L ON BRUECKMANN CASE. NET EFFECT OF PARAS 2-4 OD DRAFT SHOULD BE TO PERMIT US TO REBUT ANY SUGGESTION THAT CONSTITUTIONAL COURT HAS BEEN GIVEN JURISDICTION IN BERLIN MATTERS OR THAT ITS DECISIONS ARE AUTOMATICALLY APPLICABLE IN BERLIN. AT SAME TIME DRAFT WOULD PROVIDE FLEXIBILITY FOR BERLIN AUTHORITIES TO TAKE QUICK ACTION TO ENSURE THAT LAW IS SAME IN FRG AND BERLIN. AS EXAMPLE OF HOW PROCEDURE WOULD WORK IF BK/O ALONG THESE LINES PROMULGATED, HOUSE OF REPRESENTATIVES WOULD PASS MANTELGESETZ ADOPTING ABORTION LAW IN SAME FORM AS IT PASSED BUNDESTAG. IT WOULD THEN PASS SECOND LAW CONTAINING SAME AMENDMENT TO THAT LAW WHICH HAD BEEN EFFECTED IN FRG BY COURT DECISION. GEORGE

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## Message Attributes

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**Capture Date:** 01 JAN 1994  
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**Current Classification:** UNCLASSIFIED  
**Concepts:** ABORTION, LAW, FAMILY PLANNING, COURT DECISIONS  
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**Copy:** SINGLE  
**Draft Date:** 20 JAN 1975  
**Decaption Date:** 01 JAN 1960  
**Decaption Note:**  
**Disposition Action:** RELEASED  
**Disposition Approved on Date:**  
**Disposition Authority:** GolinoFR  
**Disposition Case Number:** n/a  
**Disposition Comment:** 25 YEAR REVIEW  
**Disposition Date:** 28 MAY 2004  
**Disposition Event:**  
**Disposition History:** n/a  
**Disposition Reason:**  
**Disposition Remarks:**  
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**Drafter:** n/a  
**Enclosure:** n/a  
**Executive Order:** GS  
**Errors:** N/A  
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**Office:** ACTION EUR  
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**Original Handling Restrictions:** n/a  
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**Page Count:** 4  
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**Previous Handling Restrictions:** n/a  
**Reference:** 75 STATE 181058, 75 (197, 75 USBERLIN 1136, 75 (197  
**Review Action:** RELEASED, APPROVED  
**Review Authority:** GolinoFR  
**Review Comment:** n/a  
**Review Content Flags:**  
**Review Date:** 27 MAY 2003  
**Review Event:**  
**Review Exemptions:** n/a  
**Review History:** RELEASED <27 MAY 2003 by SmithRJ>; APPROVED <28 MAY 2003 by GolinoFR>  
**Review Markings:**

Margaret P. Grafeld  
Declassified/Released  
US Department of State  
EO Systematic Review  
05 JUL 2006

**Review Media Identifier:**  
**Review Referrals:** n/a  
**Review Release Date:** n/a  
**Review Release Event:** n/a  
**Review Transfer Date:**  
**Review Withdrawn Fields:** n/a  
**Secure:** OPEN  
**Status:** NATIVE  
**Subject:** ABORTION LAW--DRAFT BK/O TO ESTABLISH NEW PROCEDURE ON CONSTITUTIONAL COURT DECISIONS  
**TAGS:** PGOV, WB, GE  
**To:** BONN  
**Type:** TE  
**Markings:** Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 05 JUL 2006